FILED
MAY 8 1928
CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. [redacted] 133

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

v.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

LE WRIGHT BROWNING,
Attorney for Petitioner.

BROWNING & REED,
Of Counsel.

(33,435)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 983

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

v.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petition of The Chesapeake & Ohio Railway Company shows to this Honorable Court as follows:

The respondent, Tobe Stapleton, by his father and statutory guardian, seeks in this action to recover damages against The Chesapeake & Ohio Railway Company for personal injuries. The action was insti-

tuted in the Circuit Court of Floyd County, Kentucky. Upon the trial of the cause a verdict in favor of the respondent was returned in the sum of $17,500, and judgment was rendered in accordance therewith (R., 13). Upon appeal to the Court of Appeals of Kentucky, the judgment of the circuit court was affirmed, the opinion (R., 47, *et seq.*) having been delivered on the 14th day of February, 1928, and reported in 223 *Ky.*, 154; 3 *S. W.* (*2d*), 209 (advance sheets). The action was brought under and pursuant to the provisions of the Federal Employers' Liability Act (45 *U. S. C. A., Secs.* 51-59 (*U. S. Comp. Stat., Secs.* 8657-8665)). The specific act of negligence upon which a recovery was had in the circuit court and an affirmance secured in the court of appeals was an alleged violation of a certain statutory provision of Kentucky, known as the Child Labor Law, which prohibits the employment of infants under 16 years of age in certain occupations and trades (*Sec.* 331*a*, *subsec.* 9, *Ky. Statutes*), which statutory provision is set out in full as an appendix hereto.

Statement of Facts.

The facts of the case are simple and undisputed. While endeavoring to crawl under one of petitioner's freight trains, the respondent was run over and sustained injuries which consisted of a broken leg and the loss of four fingers on his right hand. At the time of the accident he was employed by petitioner as a section laborer, and had been so employed for several months prior to the accident. His chief duty was to

carry water for the other section hands, and when not so engaged he worked with them on the track. On the day of his injury, October 1, 1925, respondent was returning to the scene of the section crew's labors with a bucket of water from a nearby spring, and while attempting to crawl under a standing freight train was injured as above stated by the starting of the train. Neither the train crew nor any other member of the section crew knew of his attempt to crawl under the train until the accident occurred.

At the time of the accident the respondent was 15 years of age, and it is conceded that his employment was in violation of the Child Labor Law of the State of Kentucky (*Section* 331*a*-9, *Ky. Stats.*), which provides that "no child under the age of 16 years shall be employed, permitted or suffered to work upon any railroad, whether steam, electric or hydraulic, nor to work in any other occupation dangerous to the life or limb or injurious to the health or morals of such child," the full text of the aforesaid act being set out in the Appendix hereto.

Questions of Law to be Reviewed.

The respondent's cause of action is based upon the Federal Employers' Liability Act (45 *U. S. C. A., Secs.* 51-59; (*U. S. Comp. Stat., Secs.* 8657-8669), it being expressly alleged and admitted that at the time of the accident both the petitioner and the respondent were engaged in interstate commerce.

While other acts of negligence were alleged in the petition (R., 1-4), the sole ground upon which

a recovery was had in the trial court was the alleged employment of respondent in violation of the provisions of the Kentucky statute, and the judgment of the lower court was affirmed by the Kentucky Court of Appeals upon the express holding that a recovery upon this ground was authorized. It was not alleged or proven that the employment of respondent was negligent independent of the statute. However, under the Kentucky decisions, the employment of an infant in violation of the statute is negligence *per se*.

Louisville, H. & St. L. Ry. Co. v. Lyons, 155 Ky., 396; 159 S. W., 971.

Sanitary Laundry Co. v. Adams, 183 Ky., 39; 208 S. W., 6.

Clark v. Wells Elkhorn Coal Co., 215 Ky., 128; 284 S. W., 91.

In sustaining respondent's right of recovery because of the violation of the State statute, the Kentucky Court of Appeals expressly did so upon the ground that in suits under the Federal act the question as to what constitutes negligence within the meaning of that act "depends upon the law of the State where the injury happened unless the law of the State is in conflict with the Federal act."

The precise question of law presented for determination, therefore, is,

In a suit under the Federal Employers' Liability Act, may a recovery be had upon allegation and proof of a violation by the defendant of a State statute?

The broad question presented for decision is:

In actions under the Federal statute, is the existence or non-existence of negligence to be determined by State statutes and State rules of decision, or by the rules of the common law as construed and applied by the Federal courts?

Your petitioner respectfully contends that since the respondent's right of action arose under and depended upon the provisions of the Federal act, there could be no recovery herein upon allegation and proof of the violation of a State statute, and since that was the sole ground upon which a recovery was sought or had. that the Circuit Court of Floyd County, Kentucky, erred in overruling your petitioner's motion to peremptorily instruct the jury to find for it, and the Court of Appeals of Kentucky erred in affirming the judgment of the circuit court.

Seaboard A. L. R. Co. v. Horton, 233 U. S., 492.
New York Cent. R. Co. v. Winfield, 244 U. S., 147.
Erie R. Co. v. Winfield, 244 U. S., 170.
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Toledo, etc., R. Co. v. Slavin, 236 U. S., 367.

Your petitioner further respectfully contends that the Court of Appeals of Kentucky erred in holding and deciding that, in actions under the Federal statute, the existence or non-existence of negligence depends upon the law of the State where the accident occurred,

and that such ruling is in conflict with the decisions of this Honorable Court.

Chicago, etc., R. Co. v. Coogan, 271 U. S., 472.
Southern Ry. Co. v. Gray, 241 U. S., 333.
Cent. Vermont R. Co. v. White, 238 U. S., 507.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Court of Appeals of the State of Kentucky, commanding said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said court of appeals in this cause, which was entitled in that court: "*The Chesapeake and Ohio Railway Company, appellant, v. Tobe Stapleton, by his statutory guardian, Marion Stapleton, appellee,*" to the end that said cause may be reviewed and determined by this Court, as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that the judgment of the said Court of Appeals of Kentucky may be reversed by this Honorable Court.

THE CHESAPEAKE AND OHIO RAILWAY CO.,
Petitioner,
By LE WRIGHT BROWNING,
Its Attorney.

BROWNING & REED,
Of Counsel.

STATE OF KENTUCKY,
County of Boyd, ss:

Affiant, Le Wright Browning, being duly sworn, states that he is one of counsel for The Chesapeake and Ohio Railway Company, the petitioner; that he prepared the foregoing petition and that the allegations thereof are true, as he verily believes.

LE WRIGHT BROWNING.

Subscribed and sworn to before me by Le Wright Browning this 19th day of April, 1928.

[SEAL.] EDNA LEONARD,
Notary Public, Boyd County, Kentucky.

My commission expires June 11, 1928.

I hereby certify that I have examined the foregoing petition, and that in my opinion the petition is well founded as to matters of fact and as to matters of law, and that the case identified thereby is one and is such that the prayer of the petition should be granted by this Honorable Court.

LE WRIGHT BROWNING.

APPENDIX.

Section 331a-9, Kentucky Statutes: No child under the age of sixteen years shall be employed, permitted to, suffered (1) to sew or assist in sewing belts in any capacity whatever; (2) nor to adjust any belt to any machinery; (3) nor to oil, wipe, or clean machinery; (4) nor to operate or assist in operating any of the following-named machines: (*a*) circular or band saws; (*b*) wood shapers; (*c*) wood joiners; (*d*) planers; (*e*) sandpaper or wood polishing machinery; (*f*) emery or polishing wheels used for polishing sheet metals; (*g*) wood turning or boring machinery; (*h*) picker machines or machines used in picking wool, cotton, hair or other materials; (*i*) carding machines; (*j*) paper-lace machines; (*k*) leather burnishing machines; (*l*) job or cylinder printing presses operated by other power than foot power; (*m*) boring or drill presses; (*n*) stamping machines used in sheet metal and tinware or in paper and leather manufacturing, or in washer and nut factories; (*o*) metal or paper cutting machines; (*p*) corner staying machines in paper box factories; (*q*) corrugating rolls such as are used in corrugated paper, roofing or washboard factories; (*r*) steam boiler, steam machinery or other steam generating apparatus; (*s*) dough brakes or cracker machinery of any description; (*u*) rolling mill machinery; (*v*) power punchers or shears; (*w*) washing, grinding or mixing machinery; (*x*) calendar rolls in paper and rubber manufacturing; or (*y*) laundering machinery; (5) nor work in proximity to any hazardous or unguarded belts, machinery or gearing; (6) nor to work upon any railroad, whether steam, electric or hydraulic; (7) nor to operate or assist in operating any passenger or freight elevator; (8) nor to work in any capacity in processes in which dangerous or poisonous acids are

used; (9) nor to work in any capacity in the manufacture or packing of paints, colors of white or red lead; (10) nor to work at soldering; (11) nor to work in occupations causing dust in injurious quantities; (12) nor to work in the manufacture or use of dangerous or poisonous dyes; (13) nor to work in the manufacture or preparation of compositions with dangerous or poisonous gases; (14) nor to work in the manufacture or use of compositions of lye in which the quantity thereof is injurious to health; (15) nor to work in any tunnel or excavation; (16) nor to work on scaffolding; (17) nor to work in any capacity in, about, or in connection with any mine, coke oven or quarry; (18) nor to work in assorting, manufacturing or packing tobacco; (19) nor to operate any automobile, motor car or truck; (20) nor to work in any bowling alley; (21) nor to work in any pool or billiard room; (22) nor to work in any distillery, brewery, or other establishment where malt or alcoholic liquors are manufactured, packed, wrapped or bottled; (23) nor to work in any hotel, theater, concert hall, club, place of amusement, or any other establishment where intoxicating liquors are sold; (24) nor to work in any other occupation dangerous to the life or limb or injurious to the health or morals of such child, and as to these matters the decision of the county physician or city health officer, as the case may be, shall be final.

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No. 983

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON, RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The respondent's cause of action is based upon the Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-59) it being alleged (R., 1, 2, 3) and admitted that the petitioner was engaged, and the respondent employed, in interstate commerce at the time of the accident. The uncontradicted proof as to the nature of the work being performed by respondent sustained the allegation as to the application of the Federal statute. (See *Pederson v. Delaware, L. & W. R. Co.*, 229 U. S. 146; 33 Sup. Ct., 648; 58 L. Ed., 1125; *Philadel-*

phia, B. & W. R. Co. v. Smith, 250 U. S., 101; 39 Sup. Ct., 396; 63 L. Ed., 869.)

Consequently the question presented is as to whether or not, in an action under the Federal statute, there can be a recovery based upon an alleged violation by the defendant of a State statute.

It is respectfully submitted that the rule is established by repeated decisions of this Court that in actions under the Federal statute the right of recovery is dependent upon the principles of the common law as interpreted by the Federal courts, and that the right of action created by the statute can neither be broadened nor limited by any State statute or rule of decision.

Specific instances of the application of this principle are to be found in *Seaboard A. L. R. Co. v. Horton*, 233 U. S., 492; 34 Sup. Ct., 635; 58 L. Ed., 1062, wherein it was held that in an action under the Federal statute the plaintiff was not entitled to the benefit of certain statutory provisions of North Carolina which imposed upon the employer an absolute liability for defects in machinery and appliances and limited the common-law defense of assumed risks; in *New York Cent. R. Co. v. Winfield*, 244 U. S., 147; 37 Sup. Ct., 546; 61 L. Ed., 1045; *Erie R. Co. v. Winfield*, 244 U. S., 170; 37 Sup. Ct. 556; 61 L. Ed., 1057; *New York Cent. R. Co. v. Porter*, 249 U. S., 168; 39 Sup. Ct., 188, 63 L. Ed., 536; *Southern Pacific Co. v. Industrial Accident Com.*, 251 U. S., 259; 40 Sup. Ct., 130; 64 L. Ed., 258, wherein it was held that an employee injured in interstate commerce was not entitled to an award under a State com-

pensation act, even though, because of the absence of negligence he could not recover under the Federal Statute; in *New Orleans & N. E. R. Co. v. Harris*, 247 U. S., 367; 38 Sup. Ct., 535; 62 L. Ed., 1167, where a statute of Mississippi providing that proof of injury was *prima facie* evidence of negligence was held inapplicable to an action under the Federal statute; in *Toledo, St. Louis & W. R. Co. v. Slavin*, 236 U. S., 454; 35 Sup. Ct., 306; 59 L. Ed., 671, where it was held that a statute of Ohio abolishing the defense of assumed risks was without application in an action by an employee injured while engaged in interstate commerce.

The precise question here involved was before the supreme courts of Arkansas, Michigan and California in the cases of *St. Louis-San Francisco Ry. Co. v. Conly* (*Ark.*), 241 S. W., 365; *Petronek v. Minneapolis, etc., R. Co.* (*Mich.*), 216 N. W., 467, and *Smithson v. Atchison, T. & S. F. Ry. Co.* (*Cal.*), 162 Pac., 111, and in all three cases it was decided that in an action under the Federal statute a plaintiff could not rely upon a violation of a statute of the State as evidence or proof of negligence.

The erroneous conclusion reached herein is due to the insistence of the Kentucky court on following a rule laid down in an earlier decision (*Cincinnati, N. O. & T. P. Ry. Co. v. Swan*, 160 Ky., 458; 169 S. W., 886), to the effect that in suits under the Federal statute "the rules of law prevailing in this State must be looked to in determining whether or not the acts or omissions complained of amount to negligence." Such a declaration is in direct conflict with the ruling of

this Court that in actions "under the Federal Employers' Liability Act, rights and obligations depend upon it, and applicable principles of the common law as interpreted and applied in the Federal courts." (See *Southern Ry. Co. v. Gray*, 241 U. S., 333; 36 Sup. Ct., 558; 60 L. Ed., 1030; *Chicago, M. & St. P. Ry. Co. v. Coogan*, 271 U. S., 472; 46 Sup. Ct., 564; 70 L. Ed., 1041.) In the case at bar the Kentucky appellate court held that "whether the railroad company is guilty of negligence depends upon the law of the State where the injury happened, unless the law of the State is in conflict with the Federal act." It is submitted that such a declaration is erroneous in its entirety. The law of the State is without application, regardless of whether or not it is in conflict with the act, for the reason that by the act itself the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of the State laws. (See *New York Cent. R. Co. v. Winfield, supra*, and authorities therein cited; *Erie R. Co. v. Winfield, supra.*) It might be noted that even under the holding of the Kentucky Court of Appeals the Kentucky statute would be without application, in that it makes negligence *per se* that which under the Federal act, standing alone, would not be negligence, to wit, the employment of one under sixteen years of age.

It is submitted that the case of *Frese v. Chicago, B. & Q. R. Co.*, 263 U. S., 1; 44 Sup. Ct., 1; 68 L. Ed., 131, relied upon by the Kentucky court as supporting its conclusion herein, is not in point or in any way in conflict with the authorities hereinbefore cited. This

court was not there dealing with any attempt to broaden or add to the Federal act. The only question under consideration was whether or not the negligence of the plaintiff's intestate was the sole proximate cause of the accident. In determining this question the court referred to an Illinois statute which imposed upon railroad engineers certain duties for the protection of the traveling public. This statute did not attempt to regulate or affect the liability of railway companies to their employees, and the court in giving it effect did so just as it would have given effect to a rule or regulation of the railway company adopted to insure safe operation of its trains.

One of the obvious purposes of the Federal act is to insure uniformity of substantive law in every court and every State, and, as said in *Michigan Cent. R. Co. v. Vreeland*, 227 U. S., 59, 66, 67; 33 Sup. Ct., 192; 57 L. Ed., 417, "We may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury."

Since the only ground upon which a recovery was had herein was the alleged violation of the Kentucky statute, it is respectfully submitted that the petitioner's motion for a directed verdict should have been sustained, and that the Court of Appeals of Kentucky erred in refusing to so decide.

LE WRIGHT BROWNING,
Counsel for Petitioner.

BROWNING & REED,
Of Counsel.